upon all. So as to that of the Common Pleas and of the Supreme Court. There may, however, be unconstitutional sections in those acts. As to this we are not now called upon to speak.

The section then under consideration being special, and upon the practice of the law, is prohibited by that clause of section 22, art. 4, of the constitution, which provides that no such act shall be passed, "regulating the practice in courts of justice."

5. The first section of the act is also void, so far as it gives, as to amount, unlimited jurisdiction to justices of the peace. In that particular it is special, and in conflict with that clause of the section of the constitution just cited which prohibits special laws; "regulating the jurisdiction and duties of justices of the peace and of constables."

This point, however, does not affect the present case. The judgment is reversed, with costs, and the cause remanded for trial and judgment according to the course of the general law of the State.

In the Supreme Court of Chittenden (Vt.) County, 1855.

DAVIES & AUBIN *vs.* JOHN BRADLEY & CO.

Where a shipper consigns goods to a factor and endorses and sends forward bills of lading for them, and upon the faith of such bills of lading the factor makes advances. *Held*, that the facts constituted such a symbolical delivery of the goods to the factor or consignee as to amount to a constructive possession, and that the factor's lien attached.

The opinion of the court was delivered by

REDFIELD, Ch. J.—The question in the present case is in regard to the right of a factor to a lien upon goods consigned to him and upon which he has made advances. Ashurst, J. in giving the opinion of the court in *Lickbarrow* vs. *Mason*, 1 H. B. 357; 2 T.

R. 63; 6 East, 21, a very leading case upon this subject, says, in regard to a bill of lading, "If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendor only, but he has made it an endorsable instrument. The judge seems to consider the fact that the bill is made to deliver to assigns, essential to its validity, in the hands of a bona fide purchaser of the goods. 3 B. & Al. 282; 1 Ld. Raym. 271. And in Chitty upon Contracts it is said, p. 485, "if the bill of lading be to deliver to A, he should be plaintiff. The bill of lading will decide who shall sue the carrier, citing *Bryans* vs. *Nix*, 4 M. & W. 775. The form of expression used by Mr. Chitty, as indicating who is to bring the suit, upon the face of the contract of consignment, or receipt by the carrier, is the very identical language of two of these receipts. "June 13, 1848. Received of B. & H. Boynton, twenty-two bales of wool, *to be forwarded to Davies & Aubin.*" The one of May 30, is "*to forward Davies & Aubin,*" and that of the 15th June. is, "Received in store, &c. of B. & H. B., for Davies and Aubin," which is still more explicit, if possible. In the case of *Bryans* vs. *Nix*, the paper called indifferently a shipping receipt, and a bill of lading, was not made to assigns, but only to the plaintiffs, and the effective part of the contract was to be delivered to Delany & Co. at Dublin, in care for and to be shipped to the plaintiffs in the action, which is certainly no more express in its undertaking to forward the goods to plaintiffs, than the contract of defendants in the present case. In either case it is an express promise to deliver to the consignees. It can, by no kind of refinement, be made to signify anything else. And according to all the cases, if the plaintiffs had been purchasers, this would have vested the absolute title in them, subject only to the right to stop *in transitu*, which right might have been defeated, by a bona fide transfer of the bill of lading for value. In *Hall* vs. *Griffin*, 10 Bing. 246, it was held, that the transfer of a wharfinger's receipt was a transfer of the property. And Tindale, Ch. J. said, "it had been the practice to consider money advanced, upon a wharfinger's receipt, in the same light as if advanced on the actual delivery of goods." And the holder of a lighterman's receipt is said to have a

control over the goods till he can obtain a bill of lading. *Craven* vs. *Ryder*, 6 Taunton, 433.

As contended by counsel in the case of *Bryans* vs. *Nix*, the contract was destitute of almost all the essentials of a bill of lading. It was no voyage at all, but a mere transfer along a canal boat to Dublin, and from thence to Liverpool. But the court held that the consignees acquired a sufficient title to all the cargo which was actually put on board the boat by the consignors, before the shipping receipt was executed, and forwarded to the plaintiffs, but not to such, as was then under their control and not shipped, so that the mere promise to ship certain articles set apart, would not be sufficient, but it must actually be done, and the shipper's receipts according to most of the cases forwarded and the bill accepted, or advances made upon the faith of such shipment, before any new destination is given to the cargo. Until that is done the matter is ambulatory, and dependent upon the will of the consignor. But afterwards, it is beyond recall. In that case the consignor altered his mind before the second boat was landed and gave an order to the shipper to have its cargo delivered to another person, as also the first. And the court held, that the first was beyond his control and not the second, because the order was countermanded before it was shipped.

It seems impossible to distinguish the present case, in principle, from the case of *Bryans* vs. *Nix*. There are many cases where a symbolical meaning of goods with an advance, or acceptance upon the faith of the delivery of such symbol, has been held to create a lien upon the goods, the same as the actual delivery. In *Hall* vs. *Griffin*, 10 Bing. 246, before referred to, one Willson was the owner of goods, which were about to be shipped from Stockton to London and took a wharfinger's receipt for them, which he handed over to plaintiff upon an advance of money. The plaintiff showed this wharfinger's receipt to the wharfinger at London before the goods arrived, and he promised when they did arrive to deliver them to plaintiff. And the court held, that the plaintiff acquired such an interest in the goods, as will enable him to maintain trover. This is put by the court upon the ground, that it is a symbolical

delivery of the goods, the same says Bosanquet, J., as if the goods passed from hand to hand.

In the case of *Craven* vs. *Ryder*, 6 Taunton, 433, the plaintiffs contracted to sell sugars to one French, and put them on board the ship for that purpose, but took a lighterman's receipt for them as shipped "for and on account of the plaintiffs" and although the master gave a bill of lading, certifying that the goods were shipped for French, or his assigns, it was held, that he did this in his own wrong until the lighterman's receipt is surrendered. That was the contract of consignment, until exchanged for the bill of lading.

So that to give a factor a lien upon goods consigned, but not actually received, these incidents must concur. 1. The consignment must be in terms to the factor. That was so in the present case, as much as if a formal bill of lading had been made in his name, omitting assigns. So that the undertaking of Bradley & Co. is in terms, to forward them to Davies & Aubin, and for their benefit. They are upon the face of the forwarder's receipt, (which is in fact a bill of lading, as far as one can properly exist in these inland transactions,) the party entitled to sue, and the instrument binds the defendants to forward the goods to the plaintiffs, and equally binds the carrier, to deliver to them, and *prima facie* the plaintiffs are the only party entitled to receive the goods, upon the face of the transaction. B. & H. Boynton had parted with their control over them. 2. But to the conclusiveness of such a contract against creditors and subsequent purchasers, it is requisite that the consignee should have made advances or acceptances, upon the faith of these particular consignments. That, too, we think is shown by the testimony, and found by the jury.

In addition to this, which seems commonly sufficient to give the factor a lien, and is all that existed in *Holbrook* vs. *Wight*, 24 Wendell, 169, and which seems to us to be a sensible, and we see no reason to doubt, a sound case. In addition to all this, the present case does contain what all the cases and all the books upon this subject, as far as I can learn, have ever regarded as a symbolical delivery of the goods, the sending to plaintiffs the shipper's receipt, which is in effect and in terms, a consignment, or bill of lading to

the plaintiffs. For what is a bill of lading? It seems to be nothing more than an acknowledgment that the goods are put on board the ship, at one port, to be delivered to A. B. at another port, or to his assigns. This contract is commonly executed in triplicates, one of which is kept by the master for his own information, as to the nature of his undertaking, one is retained by the consignor, to show that he has shipped the goods, the other, which is the only one intended to be negotiated, is forwarded to the vendee or factor, and if these persons endorse such bill of lading, for value, it passes the title of the goods even to the defeating of the right to stop *in transitu*. The consignor may, if he choose, take the bill of lading in his own name, and then he can endorse it. But, unless he restricts the consignment to be delivered for his own use, the consignee is the party *prima facie* entitled to control the delivery, and the title. And this is the form of the present consignment. And the shipper's receipt, being delivered to plaintiff, and acceptances made upon its faith, the plaintiffs title was perfected to the extent of his lien, and this point is expressly put to the jury and found.

This point was considered and decided by the court when the case was last before us, and is repeated in 24 Vt., 55, and the re-argument and re-examination has confirmed our convictions of the entire soundness of the decision. We do not think the question is one susceptible of reasonable doubt, and it seems to us to have been properly submitted to the jury, so that we might here content ourselves by affirming the judgment; but we are induced to examine the cases further to some extent.

The case of *Holbrook* vs. *Wight*, 24 Wendell, 168, is a full authority for the decision of the county court in this case. There the plaintiffs were commission merchants in New York, and their correspondents manufacturers, at Middlebury, Vermont. They advised the plaintiffs of the goods being in readiness to be forwarded to them, and that they would be sent to a house in Troy, as soon as consistently could be, to be forwarded to plaintiffs in the spring. That was done, and the goods sent to a forwarding house in Troy, with instructions to forward them to plaintiffs upon the opening of navigation. The consignors, about this time, drew upon the plain-

tiffs for $6,000, at different dates, which the jury found, as they did in the present case, the plaintiffs accepted, relying upon these consignments. The consignors, being pressed by other creditors, made a different disposition of the goods, while remaining in the hands of the forwarder, at Troy, and ordered them into other hands, and to be delivered to other parties. But the court held that the lien of the first consignees was perfected, and the subsequent disposition of the property could not defeat their rights. In this case there was nothing like a symbolical delivery which does exist in most of the English cases upon this point, and equally in the present case, and which seems to be regarded by most jurists and merchants, as an essential element in a consignment to a factor, in order to perfect his lien for advances made upon the faith of such consignment, and which fact is regarded as amounting, in all cases, to a substantial change both of title and possession. The case of *Taylor* vs. *Kymer*, 3 B. & Ad. 320, is a very elaborate and well considered case, where this distinction is fully recognized. It may be here noticed that some of the English cases treat a formal bill of lading as strictly negotiable, notwithstanding the omision of the word assigns. *Renteria* vs. *Reuding*, 1 M. & M. 511. But no question of that kind arises in the present case, see 1 Smith's Leading Cases, 260, note to *Miller* vs. *Race*, where the proposition is attempted to be maintained that no instrument, by the English common law, is strictly negotiable, unless in terms made to assigns, or order, or bearer, &c., that is, unless its negotiable quality appears, in terms, upon the face of the instrument. None of the principles laid down in the case of *The Frances*, 8 Cranch, 335 *et seq.* have much application to this subject, as the questions there discussed, have reference to prize cases, nor does any general principle there laid down, conflict at all with our decision here. *Mitchell* vs. *Ede*, 39 Eng. Com. L. 260, 11 Ad. & Ellis, 888, is decided chiefly upon the question of the intention to consign the particular goods, and the effect of endorsing a bill of lading, as passing the absolute title, and so far as the symbolical delivery is concerned, is an authority for our present decision. In the case of *Elliott & Boynton* vs. the defendants, 23 Vt. 217, there was no advance or acceptance upon the faith of any particular con-

signment, and nothing like a symbolical delivery, which leaves the case wholly dissimilar to the present. No shipping list or receipt was ever delivered to the plaintiffs in that case, by any one. The case of *Whitehead* vs. *Anderson*, 9 M. & W. 534, where it is held that to constitute a constructive possession in the consignee, the forwarder or carrier must enter into some new and specific contract to deliver to the consignee, is this very case, as we understand the shipper's undertaking. The case of *Gardner* vs. *Howland*, 2 Pick. 599, seems to us a full authority for the decision we here make. Here, the delivery of the invoice with an assignment, is regarded as a symbolical delivery of the ship. Without speaking in detail of the other cases, which seem to us more remote from the very points involved in this case, we conclude by saying that no case, and, so far as we can perceive, no principle conflicts with the plaintiffs' right to recover.

It is scarcely needful to advert to any criticisms which were attempted at the bar, upon the opinion of the court, in the 24th of Vt. in the same case. We have shown that the decision is sound and tenable, we think, and if it were not, it must, according to the settled practice of this court, govern the same case; but we do not consider the opinion of the court, as there reported, is fairly open to the objection, that it is extra-judicial, and mere *obiter dictum*, because the judge does not confine his argument to the single point urged by counsel. That might have been sufficient, but it was by no means so entirely free from all cavil, as the reason urged by the learned judge, which so far from being his own individual speculation, was the very ground, and the chief ground upon which the case was rested by the different members of the court at the consultation, and it is too well and too convincingly stated, to require any attempt at support or commendation from me.

Judgment affirmed.